January 9, 2009

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Re: *State of Delaware v. Mark J. Munzer*
Case No.: 0805019677
Letter Memorandum on State's Motion for Reargument
CCP Crim. R. 57(b); CCP Civ. R. 59(e)

Dear Counsel:

On or about December 16, 2008 the State of Delaware filed a Motion for Reargument (the "Motion") in the above criminal action. As authority for the motion, the Attorney General cited *Court of Common Pleas Criminal Rule* 57(b) and *Court of Common Pleas Civil Rule* 59(e).

The Court would remiss if it did not note that *Court of Common Pleas Criminal Rule* 57(b) authorizes the State to proceed "in any lawful manner, not inconsistent with these [criminal]rules or with any other applicable statute. However, the Attorney General seeks to review a criminal Opinion issued by this Court on December 9, 2008

pursuant to a civil rule, not a criminal rule. *CCP Crim. R.* 57(b) authorizes the State to seek redress or proceed "in any lawful manner not inconsistent with these [criminal] rules." No case law or statutory authority was offered for the State's Motion. The Rule does not specifically address civil redress in the context of a criminal proceeding. The Attorney General also filed on December 11, 2008, without leave of this Court, or through a Briefing Order or schedule issued by this Court, a Letter Memorandum in Support of their position.

However, in the interest of justice, this Court shall decide the State's Motion. The Attorney General argues the Court should reconsider its conclusions issued in the December 9, 2008 opinion as follows:

> "(i.) First the facts weren't objectively considered, supported the officer's exercise of the "community care doctrine" and
> (ii) "the defendant was unlawfully impeding the flow of traffic, as evidence by the six to eight vehicles that exited their lane of travel to go around the defendant. (See e.g. 21 *Del. C.* §4171, §4179(e)(16))."

I. <u>The Defendant's Response</u>.

On December 19, 2008 Defendant filed a formal written response to the State's Motion. Defendant argues that the State's Motion should be denied for several reasons. First, defendants asserts that the arresting officer, Corporal Dempsey of the Department of Natural Resources, testified the defendant was stopped for obstructing traffic on Red Lion Road, but never indicated there was a medical or health related problem or in some fashion that the defendant was in peril. Nor did Corporal

Dempsey indicate in his direct testimony on articulated Title 21 motor vehicle violation the State now asserts in its Motion as the legal basis for the stop of defendant's motor vehicle. Defendant argues although his client may have been "leaning over", however, Corporal Dempsey indicated he never testified there was any medical emergency or peril requiring police assistance. No medical basis was offered for the stop. According to defendant, nor did Corporal Dempsey testify at the Suppression Hearing if he could recall tinted windows on defendant's motor vehicle. Hence, the defendant argues the "community care doctrine" doesn't apply to the facts of this case.

Defendant further argues that Corporal Dempsey, when asked at trial at the Suppression hearing, testified he is not familiar or aware of the community care doctrine, citing *Williams v. State*, 2008 WL. 5064756 (Del. Supr.). Hence, the defendant argues no peril or emergency existed and no stop may be initiated by the arresting officer under this doctrine. In addition, according to the defendant the facts at the Suppression hearing indicated that when Corporal Dempsey approached the defendant's car, the defendant was actively pulling away from his stopped position from the railroad crossing. Hence, the defendant argues the community care doctrine further has no application because the defendant was properly stopped in the middle of the roadway, with no motor vehicle violations, and defendant properly drove away or a public roadway.

Finally, defendant argues in this answering memorandum that the legal basis for the stop is determined at the time Corporal Dempsey actually performed the traffic stop, not later at trial raised in closing arguments for the reasons articulated by the Attorney General or as why the defendant could have been stopped under Title 21. *See* 21 *Del.C.* §4179(e)(16) and 21 *Del.C.* §4171. Defendant argues that the Court's consideration must be limited to the testimony of Corporal Dempsey presented at trial as to the articulated basis for the traffic stop, not a new theory proffered by the State.

II. Introduction.

At first glance, on the face of the State's pleadings, it would appear the State's Motion is meritorious and should be granted. However, as set forth below, a careful scrutiny of the trial record dictates otherwise. First, the legal arguments set forth in the State's Motion appear in re-direct testimony of Corporal Dempsey after he certified on the record he was not even familiar with the community care doctrine. Hence, the statutes in Title 21, the motor vehicle code, as set forth in the State's Motion as the legal basis for the stop of the defendant were not the reasons set forth by their chief prosecuting witness, Corporal Dempsey at the suppression hearing.

Corporal Dempsey candidly testified as follows:

"Q. Officer, are you familiar with the Community Care Doctrine?"

"A. No, I'm not, Sorry."

(*See; Trial Transcript*, at 33).

III. The Official Transcript of the Proceedings.

Other than the facts set forth in this Court's December 9, 2008 opinion the transcript of the Suppression hearing indicates that defendant was stopped at the railroad crossing when Corporal Dempsey first observed him.[1] Corporal Dempsey was drawn to the attention of the defendant's motor vehicle because Corporal Dempsey was stopped at the train crossing; heading northbound; and observed the defendant stopped in the middle of the road waiting for the train to pass. According to Corporal Dempsey, there was a train that had "just finished going through", coming through the crossing and "I observed a black or dark colored Charger on the southbound side, facing my direction. "I was like two cars back from the train crossing."

Corporal Dempsey "looked over" and "it appeared the driving was kind of leaned over and he wasn't moving." Corporal Dempsey did not articulate at the Suppression Hearing that the defendant appeared to be in need of medical assistance, was in peril, or that the officer needed to take immediate appropriate action to render assistance or mitigate the peril. Nor could Corporal Dempsey recall if defendant's windows were tinted in his motor vehicle. In short, nothing in the transcript indicates there was "objective, specific and articulable facts from which an experienced officer

[1] Following the Attorney General's Motion for Reargument, the Court ordered an official transcript of the Suppression Hearing.

was suspecting a citizen is in need of help or is in peril." *See, e.g., Williams v. State*, 2008 WL 064756 (Del. Supr.).

The unrebuted evidence at the Suppression Hearing was that the defendant's vehicle was in the middle of the roadway, stopped at the railroad crossing. Defendant's car was first in line. The defendant was not committing, or about to commit, or had committed a motor vehicle violation or crime when Corporal Dempsey observed him.

On cross-examination, Corporal Dempsey indicated that he had "no idea what was going on". (Transcript at 20). When questioned several times by defense counsel and asked about whether the defendant had committed an offense, was committing an offense, or was about to commit an offense, Corporal Dempsey did not specify a Title 21 violation other than the defendant was stopped in the middle of the roadway. On cross examination, Corporal Dempsey testified the defendant was stopped and waiting for the train to pass.[2]

In addition, on cross-examination, Corporal Dempsey testified he activated his emergency equipment and made his charging decision to stop defendant as he was moving by the defendant crossing the railroad tracks in the opposite direction.[3]

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[2] *See; Kozak v. Comm'r of Public Safety,* 359 N.W.2nd 625, 628 (Minn.Ct.App. 1984). Defendant's motor vehicle in the instant case was stopped, properly in the middle of the roadway; waiting for a passing train to pass; with no incumbent motor vehicle Title 21 violations. No other reasonable articulable suspicion of criminal activity was articulated by Corporal Dempsey. Unlike the facts of *Kozak*, defendant was not articulated to be in peril requiring immediate assistance or stopped illegally in the roadway invoking a motor vehicle violation or reasonable articulable suspicion of a crime committed or has been committed.

[3] Hence the after the fact charging decision facts do not appear to be relevant because Corporal Dempsey already made his decision to stop defendant as he was crossing the railroad tracks.

IV. THE LAW

In *State v. Robert S. Edwards*, 2002 Del. C.P. LEXIS 28, Clark, Judge (May 31, 2002) this Court applied the following standard to similar facts as follows:

> A police officer may detain an individual for investigatory purposes for a limited scope, but only if the detention is supported by a reasonable and articulable suspicion of criminal activity. ***Jones v. State,*** 745 A.2d 856 (Del. 1999), **[*4]** (citing ***Terry v. Ohio,*** 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868, (1968)). A determination of reasonable and articulable suspicion must be evaluated by the totality of the circumstances as viewed through the eyes of a reasonable, trained police officer under the same or similar circumstances, combining objective facts with the officer's subjective interpretation of them. ***Id.*** The Delaware Supreme Court defines reasonable and articulable suspicion as an officer's ability to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. ***Id.*** In the absence of reasonable and articulable suspicion of wrongdoing, detention is not authorized.
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> * * *

In *State of Delaware v. John C. Dinan*, 1998 Del. C.P. LEXIS 31, (Welch, J. Oct. 15, 1998), this Court applied a "similar standard" for a motor vehicle stop by a police officer:

> As stated in *State v. Arterbridge,* 1995 Del. Super. LEXIS 587, 1995 W.L. 790965 (December 7, 1995), the law with regard to "reasonable articulable suspicion" provides as follows:
>
> The Fourth Amendment in Article 1, Sec. 6 of the Delaware Constitution **[*7]** protecting individual's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Del. Const. Art. I § 6. Accordingly, a

police officer must justify any "seizure" of a citizen. The level of justification required varies with the magnitude of the intrusion to the citizen. See, *U.S. v. Hernandez,* 854 F.2d 295, 297 (8th Cir. 1988). Not every contact between a citizen and a police officer, however, involves a "seizure" of a personal under the Fourth Amendment. See, *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868, n16 (1968); *see also, Thompson v. State, Ark. Supr.,* 303 Ark. 407, 797 S.W.2d 450, 451 (1990). . . .

There are three categories of police-citizen encounters. See, *Hernandez,* 854 F.2d 295 at 297. First, the least intrusive encounter occurs when a police officer simply approaches an individual and asks him or her to answer questions. This type of police-citizen confrontation does not constitute a seizure. *Robertson v. State,* Del. Supr., 596 A.2d 1345, 1351 (1991) (citing *Florida v. Bostick,* 501 U.S. 429, 434, 115 L. Ed. 2d 389, 111 S. Ct. 2382 *(1991);* **[*8]** *Hernandez,* 854 F.2d 295 at 297. Second, a limited intrusion occurs [like the facts of this case] when a police officer restrains an individual for a short period of time. This *Terry* stop encounter constitutes a seizure and requires that the officer have an "articulable suspicion" that the person has committed or is about to commit a crime. *Hernandez,* 854 F.2d at 297. Third, the most intrusive encounter occurs when a police officer actually arrests a person for a commission of a crime. Only "probable cause" justifies a full scale arrest. Id. n2. (emphasis supplied)

As stated in *Arterbridge*, "stopping an automobile falls under the second category and therefore requires that the officer have a reasonable articulable suspicion to do so." *Delaware v. Prouse,* 440 U.S. 648, 59 L. Ed. 2d 660, 99 S. Ct. 1391 (1979). Initially in this matter the Court, as it did in *Arterbridge*, must determine whether the police officer had a reasonable articulable suspicion to stop the defendant's vehicle on March 24, 1998. There was clearly a "seizure" because under the facts of this case, Officer Huber restricted the liberty by a show of authority by turning on his overhead lights, siren and beeping his horn when following the defendant. *Terry, 392 U.S. at 20 n.16.* This

police contact "conveyed to a reasonable person that he or she is not free to leave." *United States v. Mendenhall,* 446 U.S. 544, 545, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980); *Florida v. Royer,* 460 U.S. 491, 502, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983*)*. The Court must make this decision objectively by viewing the "totality of circumstances surrounding the incident at that time." *Mendenhall,* 446 U.S. 544 at 545. **[*10]**

*** * ***

As stated in *State v. Harmon*, 2001 Del. Super., LEXIS 338, Bradley, J., August 22, 2001, the following standard applies:

"B. Legal Standard for the Stop

The quantum of evidence required for reasonable articulable suspicion is less than that of probable cause. *Downs v. State,* Del. Supr., 570 A.2d 1142, 1145 (1990). The former requires that an objective standard be met: "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate?" *Terry v. Ohio,* 392 U.S. 1, 21, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) (internal quotations omitted). If Harmon had not actually violated any statutes, this reasonable suspicion standard would be the appropriate one to have used. However, Harmon was charged **[*7]** with violating 21 *Del. C.* § 4114(a), and this violation provided the officer with probable cause to make the stop. *See, State v. Walker,* 1991 Del. Super. LEXIS 104*,* Del. Super., Cr. A. No. IK90-08-0001, Steele, J. (Mar. 18, 1991) (Order) (holding that changing lanes without a signaling is a violation of 21 *Del. C.* §4155 which created probable cause for the officer to stop the vehicle.); and *State v. Huss,* 1993 Del. Super. *LEXIS 481,* *6-7, Del. Super., Cr. A. No. N93-04-0294AC, 0295AC, Gebelein, J. (Oct. 8, 1993) (stating, "clearly then, if probable cause exists to arrest, this provides more than the reasonable suspicion necessary to stop the vehicle."). *See also, Eskridge v. Voshell,* Del. Supr., 593 A.2d 589 (1991) (ORDER); *Austin v. Division of Motor Vehicles,* 1992 Del. Super. LEXIS 10, Del. Super., C.A. No. 91A-08-2, Goldstein, J. (Jan. 9, 1992) (Op. and Order); *State v.*

Lahman, 1995 Del. Super. LEXIS 611*,* Del. Super., Cr. I.D. No. 9410011118, Cooch, J. (Jan. 31, 1995) (Mem . Op.); *State v. Brickfield*, 1997 Del. C.P. LEXIS 6, Del. CCP, Case No. 9609017975, Stokes, J. (May 8, 1997); *Webb v. State,* 1998 Del. LEXIS 107, Del. Supr., No. 332, 1997, Berger, J. (Mar. 26, 1998) (ORDER)."

* * *

In *State v. Bloomingdale*, 2000 C.P. LEXIS 63, Smalls, C.J., (July 7, 2000), the Court of Common Pleas also similarly defined the standard for this limited seizure as reasonable articulable suspicion;

> The Supreme Court when examining the issue of reasonable articulable suspicion in *Jones v. State,* Del. Supr., 745 A.2d 856 (1999) stated that the determination of reasonable suspicion must be evaluated in the context of the totality of the circumstances as viewed from the eyes of a reasonable, **[*7]** trained police officer in the same or similar circumstances, combining objective facts with an officer's subjective interpretation of those facts. The Court went on to hold that the determination in Delaware of whether an officer has reasonable articulable suspicion to detain an individual may rest not only on the Fourth Amendment of the U.S. Constitution, but also on Delaware Constitutional provisions. In reaching this decision, the Court pointed to *Arizona v. Altieri,* 191 Ariz. 1 951 P.2d 866 (1977) and concluded that a person's (particularly an anonymous caller's) subjective belief that another person is suspicious without more fails to raise a reasonable and articulable suspicion of criminal activity. (Emphasis supplied).
>
> On a Motion to Suppress, the State bears the burden of establishing the challenged search or seizure comported with rights guaranteed [the defendant] by the United States Constitution, the Delaware Constitution, a Delaware statutory law. The burden of proof on a Motion to Suppress is proof by a preponderance of the evidence.

Hunter v. State, 783 A.2d 558, Del.Supr., No. 279, 2000, Steele, J. (August 22, 2001). *State v. Bien-Aime*, 1993 Del. Super., Lexis 132, Del. Super., Cr.A. No.: IK92-8-326, Toliver, J., (March 17, 1993). (Mem.Op.)(citation omitted).; *State v. Daquon B. Anderson*, 2001 Del. Super., Lexis 509, Slights, J. (November 29, 2009).

Decision and Order

Besides the set forth in the Court's original December 9, 2008 opinion, as noted above, Corporal Dempsey conceded he was not even aware of the community care doctrine. Therefore, Corporal Dempsey could not articulate at the Suppression hearing facts which support his stop of the defendant under this doctrine, or any standards contained therein. *See, Williams v. State*, 2008 WL 5064756 (Del.Supr.). In short, while the initial reason to stop the defendant by Corporal Dempsey was that the defendant "was leaning", Corporal Dempsey did testify or articulate the defendant did not appear to be in peril, distress, or in need of assistance or articulate a motor vehicle violation in Title 21 of the Delaware Code.

In addition, motor vehicle violations cited in Title 21 and set forth in the State's Motion for Reargument were not the charging or reasons set forth in the record by Corporal Dempsey when he actively stopped the defendant. The Attorney General raised these Title 21 violations in closing arguments, and after Corporal Dempsey's testimony at the hearing in his charging decision.

A motion under *CCP Civ.R.* 59(e) is within the sound discretion of the trial court. *Brown v. Weiler*, Del. Supr., 719 A.2d 489 (1998). The Court finds the State has

not articulated new or sufficient reasons, for the trial court to reconsider its findings of fact, conclusions of law, or judgment after for jury trial. *See Hessler, Inc. v. Farrell,* Del. Supr. 260 A.2d 701 (1969).

Hence, the Motion for Reargument is therefore DENIED.

IT IS SO ORDERED this 9th day of January, 2009.

John K. Welch
Judge

/jb

cc: Ms. Juanette West, Clerk of the Court
CCP, Criminal Division